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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-LEVING HAT STORES, INC., BANKRUPT,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

IRVING L. EISNER,

Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI AND MOTION TO ADVANCE.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully submits its petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of Matter Involved.

On November 7, 1925, the respondents leased to the bankrupt, Sarnoff-Irving Hat Stores, Inc., premises at No. 102 Hanover Street, Boston, Massachusetts, for the term of ten (10) years beginning January 1, 1926, and ending December 31, 1935, at a rental of Six Thousand Five Hundred Dollars ($6,500) per annum for the first five (5) years and Seven Thousand Dollars ($7,000) per annum for the last five (5) years (R. 6 *et seq.*)

Said lease contained the following clause (R. 14):

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term."

The bankrupt was adjudicated in the United States District Court for the Southern District of New York, on August 27, 1932, on a voluntary petition filed on that date.

The respondents filed a claim which (as amended) sought to prove the following items:

(a) Rents which had become due prior to August 27, 1932 (date of petition filed plus interest to that date	$1,471.62
(b) Charges for electricity furnished prior to date of petition, with interest to that date	177.08
(c) Amount of damages under said quoted clause of the lease, to wit, the difference between the amount of the rent reserved in the lease for the residue of the term ($7,000 per year), and the fair rental value of said premises for the residue of the term (which was taken at $4,000 per year), discounted at 6% for the period from date of bankruptcy, August 27, 1932, to the respective due dates (see computation R. 20-21)	9,018.98
Total claim	$10,667.68

Said claim was allowed in full by the Referee on May 15, 1934 (R. 27-28). This order was affirmed by the United States District Court (Coxe, J.) June 14, 1934 (R. 38-39). It was again affirmed by the United States Circuit Court of Appeals for the Second Circuit on June 27, 1934.

The action of the Referee, in allowing the said item of damages, was based upon the decision of the Circuit Court of Appeals for the Second Circuit, in the case of *A. W. Perry, Inc.,* v. *Irving Trust Company, Trustee of Outfitters Operating Realty Co., Inc.,* decided February 13, 1934 (69 F. (2d) 90) (R. 31, 36). Petition for writ of certiorari in said *Outfitters Operating Realty Co.* case was granted by this Court on May 14, 1934, and is now pending before this Court (Docket No. 22, October Term, 1934).

The Memorandum by District Judge Coxe indicates that his affirmance of the Referee's order was also based upon the decision in said *Outfitters Operating Realty Co.* case and indicates further that the instant case was expedited by him "so that the question may if possible be presented to the Supreme Court at the time the *Outfitters* case is heard."

Thus the Circuit Court of Appeals has held in the instant case, as in said *Outfitters Operating Realty Co.* case that, where the termination of the lease is co-incident with the filing of the petition in bankruptcy, and where the lease contains provision for damages equal to the difference between the rent reserved in the lease for the residue of the term and the fair rental value of the premises for the same period, the landlord's claim is provable, provided "the series of installments, each made up of the rent reserved less the fair rental value for that period", be discounted at 6 per cent, and that such discount saves the clause from the objection that it provides a penalty.

Reasons Relied on for Allowance of Writ.

1. The provision in the lease in the instant case is in every material respect identical with that in the *Outfitters Operating Realty Co.* case above referred to, and the decision of the Circuit Court of Appeals upon the legal question is likewise identical in both cases. Every reason, therefore, which was asserted in the petition to this Court for certiorari in the *Outfitters* case is likewise present in this case. They may be summarized as follows:

(a) That, while the *Manhattan Properties* case (54 S. Ct. 385, decided February 5, 1934) held that claims for future rent and indemnity provisions, dependent on re-entry by the landlord, are not provable, the question remains undetermined whether a provable claim may exist where the lease provides for termination *ipso facto* upon filing of petition in bankruptcy and contains an agreement for damages effective upon such termination.

(b) That the decision of the court below allowing proof in such case is against the trend of this Court's decisions and disregards language used in the *Manhattan Properties* decision.

(c) That the decision below has therefore created an exception to the established rule that claims for future rent are not provable; that it is important to the business world to know whether this exception is valid; and that this cannot be definitely known until this Court has spoken.

(d) That the decision below is in conflict with other decisions of this Court, in that the promise contained in the clause now in question sounds as a penalty rather than as a promise to pay liquidated damages.

(e) That the measure of damages fixed in this clause is not the same as in *Wm. Filene's Sons Company* v. *Weed,*

245 U. S. 597, 602, because the clause in that case merely required determination of "rental value at the date of entry" which is reasonably susceptible of determination, whereas the clause in the instant case requires determination of the rental value as of the due date of each of the several installments of rent; that this cannot be done and that the case is therefore one where "the contingency * * * (is) such as to make any valuation of the claim impossible," within the condemnation of this Court in *Maynard* v. *Elliott,* 283 U. S. 273, 278.

(f) That the case presents not only the problem whether such a clause can give rise to a provable claim but also, if it can, "what circumscription should be written to avoid the faults of penalty, conjecture and uncertainty"; that there are many other cases even now pending, which involve this type of clause, in some of which damages in large amounts are claimed; and that this Court, by exercising jurisdiction, will be able to dispose of the entire subject and supply the business world with a rule of certainty for its guidance.

2. Your petitioner earnestly desires opportunity to present, by oral argument in this case, certain important considerations of law and practice, some of which may not be presented in said *Outfitters* case, leading to the conclusion that the clause in question is not effective to create a claim provable in bankruptcy and indicating that the decision of the court below is inconsistent with the decision of this Court in the *Manhattan Properties* case and with other applicable decisions of this Court, as well as with the consistent line of decisions heretofore in the various circuits. Such opportunity cannot be had unless this case can be heard and argued before this Court substantially at the same time as said *Outfitters* case.

WHEREFORE your petitioner respectfully prays:

1. That a writ of certiorari issue out of and under the seal of this Honorable Court to review the decree of the Circuit Court of Appeals for the Second Circuit in the above case.

2. That the decree of said Circuit Court of Appeals for the Second Circuit in the above case be reversed.

3. For such other and further relief in the premises as to this Honorable Court may seem proper.

IRVING TRUST COMPANY,
As Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Petitioner,
By JOSEPH T. STEARNS,
Assistant Secretary.
IRVING L. ERNST,
Counsel for Petitioner.

July 11, 1934.

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MOTION TO ADVANCE CASE FOR ARGUMENT.

And now comes Irving Trust Company, as it is Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc. and respectfully moves that, in case its petition for writ of certiorari in the above-entitled case shall be granted by this Honorable Court, this case be advanced and assigned for argument with said case of *Irving Trust Company as Trustee in Bankruptcy of Outfitters Operating Realty Co. Inc.* v. *A. W. Perry, Inc.*, No. 22, October Term 1934, or immediately thereafter.

IRVING TRUST COMPANY,
By JOSEPH T. STEARNS,
Assistant Secretary,
IRVING L. ERNST,
Counsel for Petitioner.

July 11, 1934.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Referee is embodied in the Referee's Order (R. 27) and in his Certificate on Petition for Review (R. 35, *et seq.*) and is not reported.

There was no opinion in the District Court. A Memorandum by District Judge Coxe appears at page 38 of the record and his order at pp. 38 and 39. Neither is reported.

There was no opinion in the Circuit Court of Appeals. The Order of said Court, affirming the decision of the District Court, is at p. 49 of the record.

Jurisdiction.

The decree of the Circuit Court of Appeals for the Second Circuit, which is sought to be reviewed, was entered on June 27, 1934 (R. 49-50).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Sec. 347 (a)).

Statement of Facts.

The facts have been stated in the foregoing petition.

Specification of Errors.

It is submitted that the court below erred:

1. In affirming the decree of the District Court.

2. In holding that the item of damages, as set forth in the respondents' amended proof of claim, set forth a provable debt and should be allowed.

3. In holding that upon the filing of the bankruptcy petition a claim for damages arose under the provisions of the lease which claim was provable in bankruptcy.

4. In holding that the clause in the lease, providing in substance that the filing of a petition in bankruptcy by or against the lessee should be deemed to constitute a breach of the lease and that thereupon, *ipso facto* and without entry or other action by the lessor, the lease should become and be terminated, and that upon such termination the lessor should be entitled to recover of the lessee damages in an amount equal to the amount of the rent reserved in the lease for the residue of the term less the fair rental value of the premises for the residue of the term, was effective to entitle the lessor to prove in said bankruptcy for such damages.

5. In holding that the agreement in said lease, with respect to damages upon termination of said lease by the filing of a petition in bankruptcy, did not sound as a penalty rather than as liquidated damages.

The Statute Governing Proof in Bankruptcy.

The issue turns upon the following Sections of the Bankruptcy Act:

> "Section 63. Debts Which May Be Proved. (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied. * * *
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."
>
> "Section 1. (11) 'Debt' shall include any debt, demand, or claim provable in bankruptcy."
>
> "Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * *"

(Bankruptcy Act of July 1, 1898, as amended, Sections 1, 17, 63; U. S. C. A. Title 11, Section 1, 35, 103.)

ARGUMENT.

Petitioner submits that claims for future rent and claims for damages under covenants, whereby the lessee agrees to indemnify the lessor against loss of rent, have for many years been held not to constitute provable claims. This rule

is supported by many decisions in the District Courts and Circuit Courts of Appeals and has now been affirmed by this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company,* 54 S. Ct. 385.

Petitioner further submits that the existence of an agreement in a lease providing that the lease shall terminate upon petition filed, and prescribing a rule of damages in that event, is not sufficient to take this case out of the rule above set out. Petitioner further submits that there is no valid ground for distinction as regards the provability of the landlord's claim between a lease which contains the clause in the instant case for termination *ipso facto* upon petition filed and for consequent damages and a lease which does not contain these provisions.

In view of the fact that the petition for writ of certiorari, which was filed in said case of *Irving Trust Company, Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.* v. *A. W. Perry Inc.,* has heretofore been granted by this Court, petitioner deems it appropriate, in connection with the filing of this petition, not to argue further propositions of law which necessarily relate to the merits of the case. These propositions, it is believed, have been presented sufficiently for present purposes in connection with the petition above referred to in said *Outfitters Operating Realty Company* case which this Court has granted. It is believed this Court will not wish to consider said propositions further at this time or to have them further discussed in connection with this application.

This petition, and the motion to advance for argument with or immediately after said *Outfitters Operating Realty Company* case, are filed with the approval and consent of the respondents, and it is understood formal consent will be filed by them.

Conclusion.

A writ of certiorari should be granted.

Respectfully submitted,

IRVING TRUST COMPANY,
By JOSEPH T. STEARNS,
Assistant Secretary,
IRVING L. ERNST,
Counsel for Petitioner.

July 11, 1934.

(5186-C)